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**Center for Individual
Freedom**

Fax

To: Renata Hesse**From:** Renee L. Giachino, Esq.**Fax:** 202-307-1454**Pages:** 3**Phone:****Date:** 1/25/2002**Re:** United States v. Microsoft Comments**CC:**

☐ **Urgent** ☐ **For Review** ☐ **Please Comment** ☐ **Please Reply** ☐ **Please Recycle**

CENTER FOR INDIVIDUAL FREEDOM

Renee L. Giachino
General Counsel and Senior Vice President

January 25, 2002

By Facsimile and Regular Mail

Ms. Renata Hesse
Trial Attorney
Suite 1200
Antitrust Division
Department of Justice
601 D Street NW
Washington D.C. 20530

Re: Comments on *United States v. Microsoft Corporation* Settlement Agreement

Dear Ms. Hesse:

Please accept this letter as the written comments of the Center for Individual Freedom (the "Center") on the revised proposed Final Judgment to be executed in the case of *United States v. Microsoft Corporation*. The Center supports, in principle, the proposed settlement and respectfully submits the following comments.

By way of introduction, the Center is a non-partisan, non-profit organization with the mission to examine and focus public, legislative and judicial attention on individual freedoms and individual rights guaranteed by the U.S. Constitution. As free-market advocates, we are opposed to over-burdensome state and federal regulations and government intervention in private businesses and property rights.

The complaint in this case charged, among other things, that Microsoft violated sections 1 and 2 of the Sherman Antitrust Act in order to maintain a monopoly and protect a barrier to entry. The proposed Final Judgment, now pending in federal court in Washington, D.C., would settle the case by requiring Microsoft to, among other things, refrain from penalizing companies that distribute competing software, charge published rates and offer uniform discounts, share application program codes for its own middleware with competitors, and make available communications protocols that will help Microsoft's competitors in the server market.

As required by the Tunney Act, the Department of Justice published a revised proposed Final Judgment in the Federal Register on November 28, 2001. (66 FR 59,452). Under the Tunney Act, the court is required to make a determination, prior to approving the proposed consent judgment, that "the entry of such judgment is the public interest." 15 U.S.C. 16(e); see also *United States v. Airline Tariff Publ'g Co.*, 836 F. Supp. 9, 11 (D.D.C. 1993).

Assessing the benefits and costs of this settlement is difficult, but clearly the public interest is better served by an expeditious settlement than continued litigation. The pace of antitrust litigation is notably slow and speed is essential here so as not to allow protracted litigation to further stifle free-market growth. In fact, the Center contends that consumer harm began with

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the competitor-driven lawsuit because distractions resulted in diminished innovation. Consumers were not harmed by the business practices of Microsoft.

As you consider the public interest in settling this case quickly, the Center strongly urges you to consider as well the constitutional implications of this case and the settlement. Article I, Section 8 of the U.S. Constitution grants to Congress the authority to establish copyright protection for authors and inventors. The Fifth Amendment to the U.S. Constitution provides additional protection for all property rights, tangible as well as intangible, including intellectual property, by prohibiting the government from taking private property for public use without just compensation. A primary purpose of intellectual property rights guaranteed under the U.S. Constitution is to provide creators and inventors with incentives to create.

A remedy sought by the Justice Department was to force Microsoft to provide its competitors with the company's "source code" for Windows operating system. The source code, in which Microsoft invested hundreds of millions of dollars for development, represents the blueprint for much of the company's success. Forcing Microsoft to reveal the source code to its competitors runs contrary to the intellectual property protections outlined in the Constitution. The proposed Final Judgment, in large part, recognizes this and incorporates safeguards to preserve Microsoft's intellectual property rights.

The Center views the Justice Department's antitrust lawsuit against Microsoft as a government attack on pro-competitive conduct and a manifestation of the growing legal tension between preserving competition and promoting innovation. In the Center's view, this trend mandates a review of our antitrust laws to insure that they are flexible enough to address the intellectual property issues raised by such cases. Certainly *United States v. Microsoft* will have a long lasting impact in the antitrust world.

For the reasons above, the Center once again urges you to adopt the proposed Final Judgment. Although not perfect, it is fair and reasonable and in the public interest. Furthermore, the Center is relieved that the district court's breakup of the company, initially voided by the appellate court, is absent from this settlement because the breakup of the company would have imposed enormous costs on consumers, as the company's efficiencies would have been destroyed.

The Center appreciates your attention to its views. Please place this letter in the appropriate public files.

Sincerely yours,

